

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 September 2002

Case No.: 2001-BLA-0978

In the Matter of:

EUGENE JOHNSON,
Claimant

v.

NLF, INC.,
Employer #1

SIMPSON MINING COMPANY, INC./
KY COAL PRODUCERS S-I FUND,
Employer/Carrier #2

GATLIFF COAL COMPANY,
Employer #3

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:

Sidney B. Douglass, Esq.
For the Claimant

Bennett E. Bayer, Esq.
For NLF, Inc.

David H. Neeley, Esq.
For Simpson Mining Co., Inc./
KY Coal Producers S-I Fund,

William M. Cox, Jr., Esq.
For Gatliff Coal Company

Phillip Giannikas, Esq.
For the Director, OWCP

BEFORE: Robert L. Hillyard
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

This proceeding arises from a claim filed by Eugene Johnson for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901, et seq., as amended (Act). In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs (OWCP). The regulations issued under the Act are located in Title 20 of the Code of Federal Regulations, and regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

Benefits under the Act are awarded to persons who are totally disabled due to pneumoconiosis within the meaning of the Act. Survivors of persons who were totally disabled at their times of death or whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis is a dust disease of the lungs arising out of coal mine employment, and is commonly known as black lung disease.

A formal hearing was held in London, Kentucky on January 10, 2002. Each of the parties was afforded full opportunity to present evidence and argument at the hearing, as provided in the Act and the regulations issued thereunder. The findings and conclusions that follow are based upon my observation of the appearance of the witness who testified at the hearing, and a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law. Post-hearing briefs were filed by the Director (OWCP), NLF, Inc., Simpson Mining Company, and Gatliff Coal Company, and have been considered in this Decision.

I. STATEMENT OF THE CASE

The Claimant, Eugene Johnson, filed the present claim for benefits on December 26, 1995 (DX 1).¹ OWCP sent a Notice of Claim to Black Thunder Mineral Investments, Ltd. (Black Thunder), on January 18, 1996 (DX 23). OWCP dismissed Black Thunder on May 23, 1996, because the evidence did not establish that the Claimant was employed by Black Thunder for one year (DX 24). OWCP sent a Notice of Claim to NLF, Inc. (NLF), and Gatliff Coal Co. (Gatliff) on February 4, 1997 (DX 27). NLF filed a Notice of Controversion on March 4, 1997 (DX 28, 30), and Gatliff filed a Notice of Controversion on May 31, 1996 (DX 35). OWCP denied the claim on June 10, 1996 (DX 18). The Claimant requested a formal hearing on June 27, 1996 (DX 19). An informal conference was held on

¹ In this Decision and Order, "DX" refers to Director's Exhibits, "CX" refers to Claimant's Exhibits, and "Tr." refers to the transcript of the January 10, 2002 hearing.

November 21, 1996 (DX 39). The District Director, OWCP, issued a Proposed Decision and Order - Denial of Benefits on January 21, 1997 (DX 39). The Claimant appealed on January 23, 1997, and the case was referred to the Office of Administrative Law Judges on May 1, 1997 (DX 40, 41). The Director, OWCP, filed a Motion to Remand for further determination of the responsible operator issue on December 8, 1997 (DX 42). The case was remanded to the District Director on December 12, 1997 (DX 42). OWCP sent a Notice of Claim to Simpson Mining Co. (Simpson), on February 17, 1998 (DX 42). Simpson filed a Notice of Controversion on March 11, 1998 (DX 42). OWCP was unable to verify the extent of the Claimant's employment, and returned the case to the Office of Administrative Law Judges on June 16, 1998 (DX 42, 43).

II. ISSUES

The specific issues presented for resolution as noted on Form CM-1025 and at the formal hearing are as follows (DX 43; Tr. 8-9):

1. Whether the claim was timely filed;²
2. Whether the Claimant is a miner;³
3. Length of coal mine employment;⁴
4. Whether the Miner has pneumoconiosis, as defined by the Act and the regulations;⁵
5. Whether the Miner's pneumoconiosis arose out of coal mine employment;⁶
6. Whether the Miner is totally disabled;⁷
7. Whether the Miner's disability is due to pneumoconiosis;⁸

² Controverted by NLF, Simpson, and Gatliff.

³ Controverted by NLF, and Simpson.

⁴ Controverted by NLF and Simpson. At the formal hearing, the Claimant stipulated to at least twenty years of coal mine employment (Tr. 9).

⁵ Controverted by the Director, NLF, Simpson, and Gatliff.

⁶ Controverted by the Director, NLF, Simpson, and Gatliff.

⁷ Controverted by the Director, NLF, Simpson, and Gatliff.

⁸ Controverted by the Director, NLF, Simpson, and Gatliff.

8. The number of dependents for the purpose of augmentation of benefits;⁹
9. Whether the named employer is the Responsible Operator;¹⁰
10. Whether the named employer has secured the payment of benefits;¹¹
11. Other issues:¹²
 - a. Whether the Miner's most recent period of cumulative employment of not less than one year was with the named Responsible Operator;¹³
 - b. Whether the regulations are constitutional;¹⁴
 - c. Whether the Responsible Operator is liable for the Miner's medical/legal expenses;¹⁵
 - d. Whether comparable work is unavailable;¹⁶ and,
 - e. Whether the medical tests meet regulatory standards.¹⁷

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The Claimant, Eugene Johnson, was born on March 24, 1939, and was sixty-two years old at the time of the hearing (Tr. 11; DX 1). He has an eleventh-grade education (DX 1). He married Lois (Disney)

⁹ Controverted by NLF, Simpson, and Gatliff.

¹⁰ Controverted by NLF, Simpson, and Gatliff.

¹¹ Controverted by the Director.

¹² These issues involve the constitutionality of the Act and the regulations. Administrative Law Judges are precluded from ruling on the constitutionality of the Act, therefore, these issues will not be ruled on herein but are preserved for appeal purposes.

¹³ Controverted by NLF, Simpson, and Gatliff.

¹⁴ Controverted by NLF and Simpson.

¹⁵ Controverted by NLF and Simpson.

¹⁶ Controverted by NLF and Simpson.

¹⁷ Controverted by NLF and Simpson.

Johnson on October 7, 1961 (DX 8). He has no dependent children (DX 1). I find that the Claimant has one dependent for the purpose of augmentation of benefits, his wife, Lois Johnson.

Smoking History

At the formal hearing, the Claimant testified that he smoked a pack-and-a-half of cigarettes per day from the age of eighteen until 1995 or 1996 (Tr. 83). The examining physicians of record reported extensive smoking histories. In a letter dated April 14, 2000, Dr. Baker wrote that the Claimant smoked for forty years, but has not smoked for the past four or five years (DX 73). In his January 26, 1996 examination report, Dr. Baker wrote that the Claimant started smoking in 1957 and currently smokes, and that he smoked two packs of cigarettes per day in the past, but now smokes four or five cigarettes per day (DX 10). Dr. Dineen wrote in his June 30, 1994 examination report that, prior to his heart surgery in 1992, the Claimant smoked two packs of cigarettes per day for forty years. He reported that the Claimant "still smokes one-half pack of cigarettes per day" (DX 38). Dr. Jarboe wrote in his May 5, 1994 examination report that the Claimant started smoking at age eighteen, and smoked one and one-half to two packs of cigarettes per day until 1992, when he had open heart surgery (DX 38). Dr. Vuskovich examined the Claimant on March 31, 1994 and reported that he started smoking at age eighteen, and smoked one and one-half to two packs of cigarettes per day, until he quit smoking in 1992 (DX 38). Dr. Broudy reported in his April 19, 1994 report that the Claimant smoked two packs of cigarettes per day for about thirty-three years, until he stopped smoking in November 1992 (DX 38).

Based on the smoking histories reported by the examining physicians, I find that the Claimant has a smoking history of two packs of cigarettes per day from 1957 through 1992, and one-half pack of cigarettes per day from 1992 to the present, for a total of seventy-five pack years.

Length of Coal Mine Employment

The Claimant alleged "30+" years of coal mine employment on his December 26, 1995 application for benefits and said that he stopped working in or around the mines on June 6, 1994 because the "mines closed" (DX 1). At the formal hearing, the Claimant alleged at least twenty years of coal mine employment (Tr. 9).

On his CM-911a Employment History form, the Claimant wrote that he was employed by U.S. Steel from 1968 to 1981, and by Black Thunder from January 1, 1994 through June 6, 1994. At the formal hearing, the Claimant testified that he began working at Simpson Mining in September, October, or November of 1987 and was laid off in the Summer of 1988 (Tr. 72-74). The Social Security Administration Itemized Statement of Earnings shows that the Claimant was employed

by NLF, Inc., from 1989 through 1991 (DX 4).¹⁸ The Claimant's W-2 forms for 1992 and 1993 show that he was employed by NLF, Inc., during those years (DX 5). The history of coal mine employment completed by the Claimant at the time he filed an application for benefits does not need to be corroborated to be found credible and, standing alone, may be the basis for a finding of length of coal mine employment. Harkey v. Alabama By-Products Corp., 7 B.L.R. 1-26 (1984).

Based on the Claimant's CM-911a Employment History form (DX 2), the Social Security Administration Itemized Statement of Earnings for the years 1955-1995 (DX 4), and W-2 forms for the years 1992-1993 (DX 5), as well as the testimony of the Claimant, I find that the Claimant worked in the coal mines beginning in July 1968 through 1981,¹⁹ from September 1987 through June 1988, from 1989 through 1993,²⁰ and from January 1, 1994 through June 6, 1994. Therefore, based on the evidence of record, a total of twenty years and four months of coal mine employment has been established.

Responsible Operator

NLF, Simpson, and Gatliff contest their status as responsible operator (Tr. 96-97). In determining liability between two or more operators meeting the criteria of § 725.492, the responsible operator is the operator that most recently employed the miner for a cumulative period of one year and which has not demonstrated an inability to pay benefits.

NLF argues that it is not the responsible operator because NLF is not an "operator," and Mr. Johnson is not a "miner," as these terms are defined by the Act and the regulations. NLF states that it is no longer in business and does not have the financial capability to pay benefits. Even if NLF is shown to be an operator, and Mr. Johnson is shown to be a miner, as these terms are defined by the Act and the regulations, NLF cannot be the responsible operator because it has demonstrated an inability to pay benefits. According to a

¹⁸ The Social Security Statement lists the following annual earnings: \$10,231.25 in 1989; \$15,903.50 in 1990; and, \$15,701.40 in 1991 (DX 4).

¹⁹ Neither the Claimant nor US Steel could supply an exact start and end date of employment. These months are based on the information in the Social Security Administration Itemized Statement of Earnings (DX 4).

²⁰ Neither the Claimant nor NLF, Inc., could supply information regarding the exact months that the Claimant began and discontinued employment with NLF, Inc. The Social Security Administration Itemized Statement of Earnings only lists his yearly total earnings and, therefore, does not reflect the exact months he worked for NLF, Inc. (DX 4).

Dunn & Bradstreet report dated December 9, 1996, NLF, Inc., is no longer an active business, and their corporate charter is not in good standing (DX 25). A letter from United States Fidelity & Guaranty states that NLF, Inc., did not obtain federal black lung coverage (DX 31, 32). Based on the Dunn & Bradstreet report and the letter from the Insurance Carrier, I find that NLF, Inc., went out of business in 1993 and does not have an insurance carrier or agent to cover this claim.

Simpson is the next employer who could be considered as the responsible operator. Simpson argues that it cannot be held liable, because there is no evidence establishing that the Claimant worked at Simpson for a cumulative period of one year, and because Simpson was not the last operator for whom the Claimant worked (Tr. 97). OWCP was unable to obtain a statement of the dates of the Claimant's employment from Simpson (DX 42). In response to questions issued by OWCP on October 28, 1997, the Claimant wrote that he worked at Simpson from February 1987 through May 1988 (DX 42). At the formal hearing, the Claimant testified that he worked for Simpson for "over a year" (Tr. 28), and later testified that he began working at Simpson in September, October, or November of 1987, and was laid off in the Summer of 1988 (Tr. 72-74). A finding concerning the miner's length of coal mine employment may be based exclusively on the claimant's own testimony, where it is uncontradicted and credible. Bizarri v. Consolidation Coal Co., 7 B.L.R. 1-343 (1984). Since the Claimant testified that he worked for Simpson for "over a year," then testified that he worked for Simpson from September, October, or November of 1987 and was laid off in the Summer of 1988, the Social Security Administration Itemized Statement of Earnings is the only uncontradicted evidence of the Claimant's work history for Simpson. The Social Security Administration Itemized Statement of Earnings does not list the specific quarters that the Claimant was employed by Simpson, but shows that he earned \$10,381.25 at Simpson in 1987, and \$528.00 at Simpson in 1988 (DX 4).

Twenty C.F.R. § 725.101(a)(32)(iii) states:

If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.²¹

²¹ A copy of the BLS table, which can be found at Exhibit 610 in the Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual, is attached hereto.

According to the BLS table, the average daily earnings of an employee in coal mining, based on the 125-day rule,²² was \$126.00 in 1987 and \$127.52 in 1988.²³ For the year 1987, dividing \$10,381.25 (the Claimant's total wages at Simpson for 1987) by the average daily wage of \$126.00, shows that he worked eighty-two days. For the year 1988, dividing \$528.00 (the Claimant's total wages at Simpson for 1988) by the average daily wage of \$127.52, shows that he worked four days. Therefore, based on the Social Security records, the Claimant was not employed by Simpson for a period of one year.

Gatliff is the only other employer who could be considered the responsible operator. Gatliff concedes that it employed the Claimant from 1981 through 1984, but argues that NLF or Simpson should be held responsible. Gatliff argues that NLF has not provided sufficient evidence to show that it is unable to pay benefits or, in the alternative, that the Claimant's earnings at Simpson are sufficient to establish that the Claimant was employed by Simpson for more than 125 days (Brief for Gatliff Coal Company, pp. 3-4). I have found the evidence sufficient to establish that NLF went out of business in 1993 and does not have an insurance carrier or agent to cover this claim. I also found that the Claimant was not employed by Simpson for a period of one year. As such, the next operator who employed the Claimant for a period of one year was Gatliff. In its post-hearing brief, Gatliff wrote, at page 3:

The Social Security earnings statement shows earnings at Gatliff Coal Company for the years 1981 through 1984 ...

The Social Security Earnings Statement for the years 1981 through 1984 shows the following earnings at Gatliff: \$20,172.24 in 1981; \$32,400.00 in 1982; \$35,700.00 in 1983; and, \$24,734.70 in 1984 (DX 4). Therefore, the Social Security Earnings Statement supports Gatliff's statement that it employed the Claimant from 1981 through 1984, as does the Claimant's testimony at the formal hearing that he worked for Gatliff from June 1981 through the Summer of 1984 (Tr. 17-18).

²² Twenty C.F.R. §§ 725.101(a)(32)(ii) states, in pertinent part: Year means a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days."

²³ The Benefits Review Board has held that the 125-day rule applies exclusively to identifying a responsible operator, and may not be used to determine the length of coal mine employment for other purposes. See Fletcher v. Director, OWCP, 2 B.L.R. 1-911 (1980). Further, the Board has rejected the argument that a year of coal mine employment is anything other than one full cumulative year of employment. Dawson v. Old Ben Coal Co., 11 B.L.R. 1-58 (1988); Gratton v. Westmoreland Coal Co., 7 B.L.R. 1-90 (1984); Soulsby v. Consolidation Coal Co., 3 B.L.R. 1-565 (1981).

Based upon the Social Security records and the Claimant's testimony, I find that Gatliff employed the Claimant for three years, from June 1981 until June 1984. As such, I find that Gatliff is properly designated as the Responsible Operator. Gatliff's oral motion to dismiss is denied. NLF and Simpson are dismissed as responsible operators.

IV. MEDICAL EVIDENCE

A. X-ray Studies

	<u>Date</u>	<u>Exh.</u>	<u>Doctor</u>	<u>Reading</u>	<u>Standards</u>
1.	12/4/01	CX 3	Baker B reader ²⁴	1/1, p,q	Fair
2.	4/24/01	CX 1	Seo	Pleural fluid accumulation bilaterally and prominent cardiac size	Not noted
3.	10/10/00	CX 1	Reedy	Congestive heart failure	Not noted
4.	8/18/00	DX 73	Seo	Mild passive congestion of the lung	Not noted
5.	7/19/00	DX 73	Seo	Passive con- gestion of the lung and trace amount of pleural fluid	Not noted
6.	7/14/00	DX 73	Daniel	Mild congestive heart failure	Not noted
7.	2/22/00	DX 70	Reedy	Congestive heart failure	Not noted
8.	4/29/99	DX 57	Not noted	2/1, q,s	Fair

²⁴ A "B reader" is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. See 42 C.F.R. § 37.51 (b)(2).

9.	10/13/98	DX 50	Alexander B reader Board cert. ²⁵	2/1, q,p	Fair
10.	8/4/98	DX 51	Sargent B reader Board cert.	No pneumo.	Fair
11.	8/4/98	DX 52	Barrett B reader Board cert.	No pneumo.	Good
12.	8/4/98	DX 53	Goldstein B reader	No pneumo.	Good
13.	8/4/98	DX 46	Mathur B reader Board cert.	1/2, p,q	Not noted
14.	8/4/98	DX 46	Marshall B reader Board cert.	2/1, q,t	Good
15.	8/4/98	DX 46	Baker B reader	1/0, q,p	Good
16.	2/29/96	DX 14	Sargent B reader Board cert.	No pneumo.	Good
17.	2/29/96	DX 15	Barrett B reader Board cert.	No pneumo.	Good
18.	2/29/96	DX 17	Baker B reader	1/1, q,q	Good
19.	1/26/96	DX 12	Sargent B reader Board cert.	Unreadable	Unreadable
20.	1/26/96	DX 13	Barrett B reader Board cert.	1/2, q,t	Good

²⁵ A Board-certified Radiologist is a physician who is certified in Radiology or Diagnostic Roentgenology by the American Board of Radiology or the American Osteopathic Association. See § 718.202 (a)(ii)(C).

21.	1/26/96	DX 16	Baker B reader	1/0, q,q	Fair
22.	6/30/94	DX 38	Dineen	0/1, ²⁶ q,q	Good
23.	5/5/94	DX 38	Jarboe B reader	0/1, q,q	Good
24.	3/31/94	DX 38	Vuskovich	No pneumo.	Good

B. Pulmonary Function Studies²⁷

	<u>Date</u>	<u>Exh.</u>	<u>Doctor</u>	<u>Age/ Height</u>	<u>FEV₁</u>	<u>FVC</u>	<u>MVV</u>	<u>FEV₁/ FVC</u>	<u>Standards</u>
1.	12/4/01	CX 3	Baker	62/70"	1.71	1.79	39	95%	Not noted
	<u>Comment:</u>		Patient unable to produce reproducible tracings; Moderate restrictive defect but tracings were not reproducible.						
2.	9/3/99	DX 67	Baker	60/70"	1.88	2.05	--	92%	Not noted
	<u>Comment:</u>		Exhalation not complete.						
3.	8/13/99	DX 67	Baker	60/70"	1.83	2.10	--	87%	Not noted
		<u>Post-bronchodilator:</u>			1.88	2.29	--	82%	
4.	4/29/99	DX 57	Smiddy	60/73"	1.52	1.52	59	100%	Good coop.
		<u>Post-bronchodilator:</u>			1.56	1.58	46	99%	and comp.; Three tracings
	<u>Comment:</u>		Patient unable to do nitrogen washout test. Patient had a heavy feeling and could not air out. Albuterol was used as a bronchodilator.						
	<u>Validation:</u>		Dr. Maan Younes wrote that this test is not acceptable, due to inconsistent effort (DX 58).						

²⁶ A reading of 0/1 is a negative finding under the regulations. The minimum finding that qualifies as showing pneumoconiosis under the regulations is 1/0. See 20 C.F.R. § 718.102(b).

²⁷ Because the physicians conducting pulmonary function studies noted varying heights, I must make a finding on the Miner's height. See Protopappas v. Director, OWCP, 6 B.L.R. 1-221, 1-223 (1983). Based on an average of the heights noted, I find the Claimant's height to be 71 inches.

5. 10/13/98 DX 48 Craven 59/73" 1.26 1.33 - 95% Good coop. and comp.; Three tracings
- Validation: Dr. N.K. Burki found this test to be invalid due to suboptimal effort. He wrote that the test traces the plateau in less than two seconds, indicating suboptimal effort (DX 49).
6. 7/13/98 DX 47 Not noted 59/71" 2.00 2.48 - 81% Not noted; Three tracings
- Validation: Dr. N.K. Burki wrote that this test is not acceptable due to less than optimal effort, cooperation, and comprehension, and the study being improperly performed. Dr. Burki wrote that the curve shapes and rapid plateaus indicate either suboptimal effort or technical fault (DX 47).
7. 1/26/96 DX 9 Baker 56/70.75" 2.70 3.56 133 76% Good coop. and comp.; Three tracings
- Comment: Mild obstructive defect.
8. 6/30/94 DX 38 Dineen 55/71.25" 2.97 4.07 120 72% Fair coop. Comp. not noted; Three tracings
- Comment: Pt. effort fairly good; minimal obstructive airway disease; Normal maximum voluntary ventilation.
9. 5/5/94 DX 38 Jarboe 55/72" 2.65 3.71 132 71% "Fairly good" coop. and comp.; Three tracings
- Comment: Mild restrictive and obstructive ventilatory defect.
10. 4/19/94 DX 38 Broudy 55/71" 2.74 3.83 120 72% Coop. and comp. not noted; Three tracings
Post-bronchodilator: 2.75 3.73 114 74%
- Comment: Mild restriction with no change after bronchodilation.

11. 3/31/94 DX 38 Vuskovich 56/178cm 2.84 3.69 - 77% Poor coop.
Good comp.
Two
tracings

Comment: Invalid because he would or could not take a complete deep breath.

C. Arterial Blood Gas Studies

	<u>Date</u>	<u>Exhibit</u>	<u>Doctor</u>	<u>pCO₂</u>	<u>pO₂</u>
1.	1/26/96	DX 11	Baker	37.7	92.3
2.	6/30/94	DX 38	Dineen	35.1	90.2

Comment: Normal blood gas analysis.

3.	5/5/94	DX 38	Jarboe	40.1	84.6
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Comment: Normal.

4.	4/19/94	DX 38	Broudy	39.2	91.7
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Comment: Normal except for elevation of the carboxy-hemoglobin, indicating continued exposure to smoke.

D. Examination Reports

1. a. On December 4, 2001, Dr. Glen Baker, a B reader and Board-certified Pulmonologist, read a chest x-ray (consistent with coal workers' pneumoconiosis, category 1/1), and administered a pulmonary function test (moderate restrictive defect, but tracings were not reproducible) (CX 3).

b. The record contains medical records from Baptist Regional Medical Center, where the Claimant was admitted by Dr. Baker from October 15, 2001 to October 17, 2001, due to increasing back pain of unclear etiology (CX 1).

c. The record contains medical records from Baptist Regional Medical Center, where the Claimant was admitted by Dr. Baker from April 24, 2001 to April 27, 2001, due to possible renal failure (CX 1). On discharge, Dr. Baker diagnosed: (1) ischemic heart disease with ischemic cardiomyopathy; (2) diabetes mellitus, insulin dependent; (3) acute renal failure with hyperkalemia, resolved; (4) chronic obstructive airway disease; (5) coal workers' pneumoconiosis; and, (6) chronic bronchitis (CX 1).

i. Dr. Baker wrote, in a History and Physical performed on April 24, 2001, that the Claimant has "chronic

obstructive airway disease and probable coal workers' pneumoconiosis" (CX 1).

d. The record contains progress notes from Dr. Baker, documenting twenty-two visits to his office by the Claimant between February 15, 2001 and November 19, 2001. Dr. Baker diagnosed the following conditions in his notes: (1) coal workers' pneumoconiosis; (2) chronic obstructive pulmonary disease; (3) arteriosclerotic heart disease; (4) diabetes; (5) chronic anxiety; (6) chronic A/C; and, (7) renal failure/insufficiency (CX 2).

e. In response to a list of questions posed by the Claimant's attorney dated January 16, 2001, Dr. Baker wrote that he has been treating the Claimant since August 13, 1999, and that he sees him every two to four months. According to Dr. Baker, he has been treating the Claimant "primary for his pulmonary condition of Coal Workers' Pneumoconiosis with associated symptoms of chronic bronchitis and related chronic airway disease." Dr. Baker opined that the Claimant has coal workers' pneumoconiosis, category 2/1, chronic obstructive airway disease, and chronic bronchitis, related to both his coal dust exposure as well as his cigarette smoking history. According to Dr. Baker, the Claimant "has advanced pneumoconiosis and should have no further exposure to coal dust, rock dust or similar noxious agents." Dr. Baker wrote that he based his diagnosis on the Claimant's chest x-ray, which he read as 2/1, and pulmonary function studies, which show moderate obstructive defect (DX 74).

f. Dr. Baker wrote, in a letter dated August 14, 2000, that the Claimant worked in the coal mines for approximately thirty-two years, and smoked for forty years but has not smoked for the past four or five years. Dr. Baker opined that the Claimant has x-ray evidence of coal workers' pneumoconiosis, and has a moderate restrictive defect (DX 73).

g. Dr. Baker examined the Claimant on January 26, 1996, at which time he reviewed the Claimant's symptoms and his occupational ("[s]tated he worked 30 yrs. (20 yrs. underground)"), medical (frequent colds, wheezing, chronic bronchitis, arthritis, heart disease, diabetes mellitus, high blood pressure, triple CABG and mechanical valve in 1992), smoking (started smoking in 1957 and currently smokes; smoked two packs of cigarettes per day in the past, now smokes four or five cigarettes per day), and family histories, and performed a physical examination, pulmonary function study (mild obstructive defect), and arterial blood gas study (within normal limits), and interpreted an x-ray (coal workers' pneumoconiosis 1/0). Dr. Baker diagnosed: (1) coal workers' pneumoconiosis 1/0, based on abnormal chest x-ray and significant history of coal dust exposure; (2) COPD with mild obstructive defect, based on the pulmonary function test; (3) chronic

bronchitis, based on history of cough, sputum production, and wheezing; and, (4) ischemic heart disease. In his opinion, the Claimant has a mild impairment with chronic bronchitis, coal workers' pneumoconiosis, and decreased FEV₁ (DX 10).

2. Dr. J. Todd Meredith issued a surgical pathology report dated May 1, 2001, in which he examined a lesion on the bottom of the Claimant's foot, and found no squamous differentiation (CX 1).

3. In response to a list of questions posed by the Claimant's attorney on December 15, 2000, Dr. John Watts wrote that he has treated the Claimant on a monthly basis since February 1999 for conditions including: hypertension, congestive heart failure, chronic obstructive airways disease, prosthetic heart valve, coronary artery disease, chronic atrial fibrillation, and type II diabetes. Dr. Watts opined that the Claimant has a disabling chronic obstructive pulmonary disease, based on the pulmonary function test performed by Dr. Smiddy, and "pulmonary evaluation." Dr. Watts opined that the Claimant's chronic obstructive pulmonary disease prevents him from performing the normal manual labor of an underground coal miner, and that his twenty years of coal dust exposure is a significant contributing factor to his chronic obstructive pulmonary disease (DX 75).

4. a. Hospital records from Baptist Regional Medical Center, dated August 17, 2000 through August 19, 2000, diagnose: (1) unstable angina; (2) arteriosclerotic cardiovascular disease, status post CAVD; (3) ischemic cardiomyopathy; (4) type II diabetes mellitus; and, (5) chronic obstructive pulmonary disease (DX 73).

b. Hospital records from Baptist Regional Medical Center, dated July 19, 2000 through July 25, 2000, diagnose: (1) atrial fibrillation; (2) acute exacerbation of chronic obstructive pulmonary disease; (3) insulin dependent diabetes mellitus; (4) essential hypertension; (5) insomnia; (6) hyperlipidemia; and, (7) hypokalemia (DX 73).

c. Hospital records from Baptist Regional Medical Center, dated July 13, 2000 through July 15, 2000, diagnose: (1) acute congestive heart failure; (2) insulin dependent diabetes mellitus; (3) coronary artery disease; (4) chronic obstructive pulmonary disease; (5) essential hypertension; (6) hyperlipidemia; and, (7) hypokalemia (DX 73).

d. The record contains hospital records from Baptist Regional Medical Center, dated from May 31, 2000 through June 10, 2000. Dr. Watts, the attending physician at Baptist Regional Medical Center, diagnosed: (1) acute exacerbation of obstructive pulmonary disease; (2) insulin dependent diabetes mellitus; and, (3) congestive heart failure (DX 70).

e. Hospital records from Baptist Regional Medical Center, dated September 15, 1999 through September 18, 1999, diagnose: (1) chest wall pain; (2) noncardiac chest pain; (3) essential hypertension; (4) insulin dependent diabetes mellitus; (5) chronic obstructive pulmonary disease; (6) known coronary artery disease; (7) status post mitro valve replacement; and, (8) atrial fibrillation (DX 70).

5. Dr. Joseph F. Smiddy wrote, in a letter dated April 29, 1999, that the Claimant has "coal workers pneumoconiosis which is of a very severe degree." Dr. Smiddy wrote that he based this diagnosis on the Claimant's chest x-ray, which he states was read by a B reader, the results of the Claimant's pulmonary function study, which shows severe restrictive impairment, and the Claimant's shortness of breath (DX 57).

6. Dr. Jack Dineen examined the Claimant on June 30, 1994, at which time he reviewed the Claimant's symptoms and his occupational (worked as a coal miner for thirty years; twenty-five of those years in the underground coal mines), medical (myocardial infarction in 1982, heart surgery in 1992, daily productive cough, short of breath, wheezing), smoking ("still smokes one-half pack of cigarettes per day;" "[p]rior to his surgery, Mr. Johnson smoked two packs of cigarettes per day for 40 years."), and family histories, and performed a physical examination, pulmonary function study (reviewed 6/30/94 spirogram; pattern of minimal obstructive airway disease; maximum voluntary ventilation was normal), and arterial blood gas study (normal), and interpreted an x-ray (0/1, q,q) and EKG. Dr. Dineen opined that the Claimant does not have pneumoconiosis. He noted that the Claimant's chest x-ray does not show the "typical parenchymal opacities necessary to make a diagnosis of coal workers' pneumoconiosis," and he "has no respiratory impairment." In his opinion, the Claimant retains the pulmonary capacity to perform his former duties as a coal miner. Dr. Dineen diagnosed chronic bronchitis, secondary to the Claimant's habit of cigarette smoking. He opined that the Claimant's cigarette smoking habit is responsible for his minimal obstructive airway disease (DX 38).

7. Dr. Thomas Jarboe examined the Claimant on May 5, 1994, at which time he reviewed the Claimant's symptoms and his occupational (currently working as a truck driver; worked in the underground mines from 1958 to 1989, states he did not wear any type of protective device during his work in and around coal dust; worked in a rebuilding shop repairing mining equipment for four years), medical (shortness of breath, cough, wheezing), smoking (started smoking at age eighteen and used 1½ to two packages of cigarettes a day until 1992, when he had open heart surgery), and family histories, and performed a physical examination, pulmonary function study (mild restrictive and obstructive ventilatory defect), and arterial blood gas study (normal), and interpreted an

x-ray (0/1, q,q). Dr. Jarboe diagnosed: (1) chronic bronchitis, based on history of chronic cough and mucous production; and, (2) status post coronary artery bypass grafting and valve replacement, based on medical history. In his opinion, the Claimant's chronic bronchitis "could be related to his previous history of very heavy smoking," but he noted that chronic bronchitis occurs in the general population. Dr. Jarboe also wrote that the Claimant's artery bypass grafting and valve replacement "may account for some of his dyspnea." According to Dr. Jarboe, the Claimant's mild restrictive defect and mild airways obstruction are not due to coal workers' pneumoconiosis. He opined that the Claimant retains the functional capacity to do his last coal mining job or to perform similar work in a dust-free environment (DX 38).

8. Dr. Matt Vuskovich examined the Claimant on March 31, 1994, at which time he reviewed the Claimant's symptoms and his occupational (worked twenty-nine years as an underground coal miner; operated equipment and worked as a repairman; operated a continuous miner for eight to ten years, a cutting machine for two to three years, worked for four years rebuilding equipment), medical (coronary artery bypass grafting surgery, mitral valve replacement, dyspnea, morning productive cough, wheezing, chest pain), smoking (started smoking at age eighteen; smoked 1½ to two packs of cigarettes per day; quit smoking in 1992), and family histories, and performed a physical examination and a pulmonary function study ("invalid because he would or could not take a complete deep breath"), and interpreted an x-ray (0/0) and an EKG (atrial fibrillation, right bundle branch block; non-specific T wave changes). Dr. Vuskovich diagnosed: (1) coronary artery disease; (2) persistent abnormal lipid profile; (3) atrial fibrillation; (4) valvular heart disease, status post-op mitral valve replacement; (5) status post-op coronary artery bypass artery grafting surgery; (6) hypertension by history; (7) non-insulin dependent diabetes mellitus by history; and, (8) obesity. In his opinion, all of the Claimant's conditions are conditions of the general population, and are in no way related to his occupation in the coal industry. Dr. Vuskovich wrote that the Claimant does not have an occupational pulmonary disease. He opined that the Claimant is physically able, from a pulmonary standpoint, to do his usual coal mine employment or comparable and gainful work in a dust-free environment (DX 38).

9. Dr. Bruce Broudy examined the Claimant on April 19, 1994, at which time he reviewed the Claimant's symptoms and his occupational (worked thirty-three years in coal mining, about twenty-five of which were underground doing all types of work, including continuous miner operator, cutting machine, mechanic and electrician), medical (triple coronary bypass and valve replacement, trouble breathing, chronic irregular heartbeats, chest pain, morning cough and sputum, wheezing), smoking ("[h]e has been a smoker until he stopped in November 1992 consuming 2 packs per

day for about 33 years."), and family histories, and performed a physical examination, pulmonary function study (mild restriction with no change after bronchodilation), and an arterial blood gas study (normal, except for elevation of the carboxyhemoglobin, indicating continued exposure to smoke), and interpreted an x-ray (category 0). Dr. Broudy diagnosed: (1) coronary artery disease; and, (2) chronic bronchitis. In his opinion, the Claimant does not have coal workers' pneumoconiosis, and retains the respiratory capacity to do his previous work or work requiring similar effort. He opined that there has not been any significant pulmonary disease or respiratory impairment which has arisen from this man's occupation as a coal worker. He wrote that the Claimant's chronic bronchitis is due to cigarette smoking (DX 38).

E. Consultative Reports

1. Dr. Gregory J. Fino, a B reader and Board-certified Internist and Pulmonologist, issued a consultative report dated January 15, 2000, in which he reviewed: ten interpretations of six chest x-rays, dated from March 31, 1994 through February 29, 1996; six pulmonary function tests, dated from March 31, 1994 through July 13, 1998; four arterial blood gas studies, dated from April 19, 1994 through January 26, 1996; and, medical examination reports by Drs. Vuskovich, Broudy, Jarboe, Dineen, and Baker, dated from March 31, 1994 to January 26, 1996. Dr. Fino opined that the Claimant does not suffer from an occupationally acquired pulmonary condition as a result of coal dust exposure, based on: (1) the majority of the chest x-ray readings are negative for pneumoconiosis; (2) the acceptable spirometric evaluations are normal with no obstruction, restriction, or ventilatory impairment; (3) there is no impairment in resting oxygen transfer; and, (4) the normal MVV means that there is no ventilatory impairment due to any obstructive or restrictive ventilatory defect. According to Dr. Fino, assuming the Claimant's last job required "sustained heavy labor," he retains the respiratory capacity to perform his last mining job or a job requiring similar effort. He based this opinion on: (1) the normal spirometry, which shows no evidence of obstruction, restriction, or ventilatory impairment; and, (2) when the Claimant gives good effort, his maximal voluntary ventilation is normal, showing no ventilatory impairment (DX 64).

2. Dr. Byron Westerfield, a Board-certified Internist and Pulmonologist, issued a consultative report dated November 22, 1999, in which he reviewed: sixteen interpretations of eight chest x-rays, dated from March 31, 1994 through October 13, 1998; seven pulmonary function tests, dated from March 31, 1994 through April 29, 1999; four arterial blood gas studies, dated from April 14, 1994 through February 29, 1996; and medical reports by Drs. Vuskovich, Broudy, Jarboe, Dineen, Baker, and Smiddy (dates of examination reports not provided). Dr. Westerfield diagnosed chronic obstructive pulmonary disease due to cigarette smoking. He

opined that the reduction in the Claimant's flow rates evidenced on the valid pulmonary function tests is not attributable to coal workers' pneumoconiosis. According to Dr. Westerfield, the Claimant does not have respiratory disability and "certainly does not have respiratory disability due to Coal Workers' Pneumoconiosis" (DX 63).

V. DISCUSSION AND APPLICABLE LAW

Since this claim was filed after March 31, 1980, it must be adjudicated under the regulations at 20 C.F.R. §§ 718, et seq. Section 718.202 provides four means by which pneumoconiosis may be established. Under § 718.202(a)(1), a finding of pneumoconiosis may be made on the basis of x-ray evidence. The record contains twenty-four interpretations of fifteen x-rays. Six interpretations, the April 24, 2001, August 18, 2000, and July 19, 2000 readings by Dr. Seo; the October 10, 2000 and February 22, 2000 readings by Dr. Reedy; and, the July 14, 2000 interpretation by Dr. Daniel, did not address the presence or absence of pneumoconiosis. Therefore, these six readings will not be discussed. Three interpretations were conducted by physicians who have no listed expertise reading x-rays. The party seeking to rely on an x-ray interpretation bears the burden of establishing the qualification of the reader. Rankin v. Keystone Coal Mining Co., 8 B.L.R. 1-54 (1985). It is improper to accord greater weight to the interpretation of a physician whose qualifications are unknown. Stanley v. Director, OWCP, 7 B.L.R. 1-386 (1984).

Fifteen of the remaining eighteen interpretations were conducted by B readers, nine of whom are also Board-certified Radiologists. Interpretations by B readers are entitled to greater weight because of their expertise and proficiency in classifying x-rays. Vance v. Eastern Assoc. Coal Corp., 8 B.L.R. 1-32 (1985); Aimone v. Morris Knudson Co., 8 B.L.R. 1-68 (1985). Physicians who are Board-certified Radiologists as well as B readers may be accorded still greater weight. Woodward v. Director, OWCP, 991 F.2d 314, 316 n.4 (6th Cir. 1993), 17 B.L.R. 2-77, 2-80 (1993). Four of the nine interpretations by dually qualified readers are positive, one is unreadable, and four are negative. Of the six interpretations by physicians who are B readers, four were read as positive. All four positive readings were by Dr. Baker. Dr. Baker's positive readings were contradicted twice by dually qualified physicians. While Dr. Baker read the Claimant's August 4, 1998 x-ray as positive, Drs. Sargent and Barrett, both dually qualified, read this x-ray as negative. Similarly, while Dr. Baker read the Claimant's February 29, 1996 x-ray as positive, Drs. Sargent and Barrett also read this x-ray as negative.

Based upon a review of the x-ray interpretations and the qualifications of the readers, I find that the x-ray evidence fails

to establish the existence of pneumoconiosis pursuant to § 718.202(a)(1).

Under § 718.202(a)(2), a claimant may establish the existence of pneumoconiosis through biopsy or autopsy results. This provision is inapplicable here because the only biopsy of record was taken of a lesion on the Claimant's foot and, therefore, did not address the presence or absence of pneumoconiosis (CX 1).

Section 718.202(a)(3) provides that pneumoconiosis may be established if any of the several presumptions described in §§ 718.304, 718.305, or 718.306 are applicable. In the instant case, § 718.304 does not apply because there is no x-ray, biopsy, autopsy, or other evidence of large opacities or massive lesions in the lungs. Section 718.305 is not applicable to claims filed after January 1, 1982. Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

Under § 718.202(a)(4), a determination of the existence of pneumoconiosis may be made if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. Pneumoconiosis is defined in § 718.201 as a chronic dust disease of the lungs, including respiratory or pulmonary impairments, arising out of coal mine employment. It is within the Administrative Law Judge's discretion to determine whether a physician's conclusions are adequately supported by documentation. See Lucostic v. United States Steel Corp., 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider opinions that are adequately supported by such data over those that are not." See King v. Consolidation Coal Co., 8 B.L.R. 1-262, 1-265 (1985).

The consulting physicians, Drs. Fino and Westerfield, and the examining physicians, Drs. Dineen, Jarboe, Vuskovich, and Broudy, opined that the Claimant does not have pneumoconiosis. Dr. Fino, a B reader and Board-certified Internist and Pulmonologist, opined that the Claimant does not suffer from an occupationally acquired pulmonary condition as a result of coal dust exposure. Dr. Fino based his opinion on a review of medical data dated between 1994 and 1998, including chest x-rays, pulmonary function tests, arterial blood gas studies, and examination reports. Dr. Fino gave the basis for his opinion and listed the medical data upon which he relied in arriving at his decision. I find his opinion to be reasoned, documented, and entitled to substantial weight.

Dr. Westerfield, a Board-certified Internist and Pulmonologist, opined that the Claimant suffers from a chronic obstructive pulmonary disease due to cigarette smoking, and does not have coal workers' pneumoconiosis. Dr. Westerfield reviewed medical data dating from 1994 through 1999, including the Claimant's chest x-rays, pulmonary function tests, arterial blood

gas studies, and medical reports. Dr. Westerfield gave the basis for his diagnosis and cited to the medical data upon which he relied in forming his conclusions. As such, I find his opinion is reasoned, documented, and entitled to substantial weight.

Drs. Dineen, Jarboe, Vuskovich, and Broudy opined that the Claimant does not have coal workers' pneumoconiosis. All four physicians examined the Claimant, took the Claimant's histories, read a chest x-ray, and administered a pulmonary function test. Drs. Dineen, Jarboe, Vuskovich, and Broudy stated that reasons for their conclusions and cited the studies upon which they relied. While their examination reports are from 1994, I find that they are entitled to substantial weight.

Drs. Baker, Watts, and Smiddy examined the Claimant and diagnosed coal workers' pneumoconiosis. Dr. Baker, a B reader and Board-certified Pulmonologist, examined the Claimant and opined that the Claimant has coal workers' pneumoconiosis based upon his chest x-ray, history of coal dust exposure, and pulmonary function studies. Although treatment notes from Dr. Baker's office show that he examined the Claimant twenty-two times between February 15, 2001 and November 19, 2001, Dr. Baker gives no other basis for his diagnosis of pneumoconiosis than the Claimant's positive chest x-ray and pulmonary function test. A pulmonary function study does not indicate the existence of pneumoconiosis; rather, it measures the level of the miner's disability. Additionally, a medical opinion which is merely a restatement of an x-ray opinion may not establish the existence of pneumoconiosis under § 718.202(a)(4). See Anderson v. Valley Camp of Utah, Inc., 12 B.L.R. 1-111, 1-113 (1989). I find that Dr. Baker's opinion is not well reasoned or documented, because he cites the positive chest x-ray and pulmonary function test alone as reasons to diagnose pneumoconiosis. As such, I accord his opinion less weight.

In response to questions posed by the Claimant's attorney, Dr. Watts wrote that he treated the Claimant on a monthly basis between February 1999 and December 2000. Dr. Watts diagnosed chronic obstructive pulmonary disease, which was significantly contributed to by the Claimant's coal dust exposure. He based his diagnosis on a pulmonary function test performed by Dr. Smiddy, and "pulmonary evaluation" (DX 75). Dr. Watts' diagnosis of chronic obstructive pulmonary disease significantly contributed to by coal dust exposure is tantamount to a diagnosis of legal pneumoconiosis. However, I find that his opinion is not well reasoned or documented, because the only known basis for his diagnosis is a pulmonary function test. As noted, a pulmonary function test is not indicative of the existence of pneumoconiosis. Therefore, I accord Dr. Watts' opinion less weight.

Dr. Smiddy examined the Claimant on April 29, 1999 and opined that the Claimant has "coal workers pneumoconiosis which is of a

very severe degree," based on the Claimant's chest x-ray, the results of a pulmonary function test, and the Claimant's shortness of breath. I accord Dr. Smiddy's opinion less weight, because he does not discuss his comments on the pulmonary function test that the Claimant was unable to do the nitrogen washout test and could not air out. Further, Dr. Smiddy states that the chest x-ray was read by a B reader, but the name of the x-ray reader is not noted on the x-ray report and I have found the x-ray evidence to be negative for pneumoconiosis.

Due to their careful analysis of the medical data, I find that the opinions of Drs. Fino, Westerfield, Dineen, Jarboe, Vuskovich, and Broudy outweigh the opinions by Drs. Baker, Watts, and Smiddy, because they are better reasoned and documented. As such, I find that the medical opinion evidence does not establish the existence of pneumoconiosis.

I find also that the evidence does not establish that the Claimant has "legal pneumoconiosis," pursuant to § 718.201(a)(2), a chronic lung disease or impairment and its sequelae arising out of coal mine employment. While Dr. Watts diagnosed chronic obstructive pulmonary disease, which was significantly contributed to by the Claimant's coal dust exposure, I found his opinion to be outweighed by the opinions of Drs. Fino, Westerfield, Dineen, Jarboe, Vuskovich, and Broudy.

Total Disability Due to Pneumoconiosis

Since the Claimant does not have pneumoconiosis, his claim cannot succeed. In any event, even if he had established the existence of the disease, the evidence does not establish that the Claimant has a totally disabling respiratory or pulmonary ailment due to pneumoconiosis. The criteria for establishing total disability due to pneumoconiosis are contained in § 718.204(b)(2).²⁸ Section 718.204(b)(2) permits a finding of total disability when there are pulmonary function studies with results equal to or less than those contained in the tables, arterial blood gas studies meeting the values listed in the tables, or where a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine work or comparable and gainful work.

The record contains eleven pulmonary function tests. The six most recent tests, administered between July 13, 1998 and

²⁸ Section 718.204(b)(2)(iii) is inapplicable because there is no evidence of cor pulmonale with right-sided congestive heart failure.

December 4, 2001, produced qualifying values. The remaining six pulmonary function tests, dated between January 26, 1996 and March 31, 1994, did not produce values equal to or below the table values.

All six qualifying pulmonary function tests may be discredited, for the following reasons. The record does not contain tracings for Dr. Baker's December 4, 2001, September 3, 1999, and August 13, 1999 pulmonary function tests, and does not list the Claimant's effort or cooperation during these tests. Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. Estes v. Director, OWCP, 7 B.L.R. 1-414 (1984). Due to the lack of tracings, I find that Dr. Baker's December 4, 2001, September 3, 1999, and August 13, 1999 pulmonary function tests are entitled to little weight.

Dr. Younes wrote that Dr. Smiddy's April 29, 1999 study is not acceptable due to inconsistent effort. Dr. Smiddy commented that the Claimant was "unable to do nitrogen washout test" and "had a heavy feeling and could not air out" (DX 57). Based upon Dr. Smiddy's comments and Dr. Younes' opinion that the Claimant gave inconsistent effort, I accord this test little weight.

Dr. Burki wrote that Dr. Craven's October 13, 1998 study is invalid due to suboptimal effort. According to Dr. Burki, this test "traces the plateau in less than two seconds, indicating suboptimal effort" (DX 49). Dr. Burki reviewed the tracings and gave the rationale for his opinion. In assessing the reliability of a study, an Administrative Law Judge may accord greater weight to the opinion of a physician who reviewed the tracings. Street v. Consolidation Coal Co., 7 B.L.R. 1-65 (1984). Additionally, the evidence of record indicates that Dr. Burki is a Board-certified Internist and Pulmonologist, while Dr. Craven is a Board-certified Family Practitioner. Due to Dr. Burki's superior qualifications and rationale for invalidating this test, I accord Dr. Craven's October 13, 1998 pulmonary function test little weight.

Dr. Burki also found the July 13, 1998 study to be unacceptable due to less than optimal effort, cooperation, and comprehension, and because the study was improperly performed. According to Dr. Burki, "the curve shapes and rapid plateaus indicate either suboptimal effort or technical fault" (DX 47). The record does not indicate the name of the physician who performed the July 13, 1998 test, and does not contain information as to the Claimant's cooperation and comprehension in performing the test. For the reasons stated above, I find that the July 13, 1998 test is entitled to little weight.

Five earlier studies, dated between January 26, 1996 and March 31, 1994, produced nonqualifying values. Based on the

nonqualifying tests and the invalidity of the qualifying tests, as discussed above, I find that the pulmonary function test evidence does not support a finding of total disability.

None of the arterial blood gas studies produced values meeting the table values.

In assessing total disability under § 718.204(b)(2)(iv), the Administrative Law Judge, as the fact-finder, is required to compare the exertional requirements of the Claimant's usual coal mine employment with a physician's assessment of the Claimant's respiratory impairment. Cornett v. Benham Coal, Inc., 227 F.3d 569 (6th Cir. 2000). At the January 10, 2002 hearing, the Claimant stated that he last worked at NLF, Inc., as a mechanic and electrician (Tr. 22). He stated that his duties included cleaning and shoveling coal off of equipment, taking rebuilt equipment underground into the coal mines, and training coal mine employees to use equipment underground (Tr. 24-25).

The record contains the opinions of nine physicians who address whether the Claimant is totally disabled due to pneumoconiosis. Drs. Fino and Westerfield, both consulting physicians, and Drs. Dineen, Jarboe, Broudy, and Vuskovich, all of whom are examining physicians, opined that the Claimant is not totally disabled due to pneumoconiosis.

Dr. Fino, a B reader and Board-certified Internist and Pulmonologist, wrote that, assuming the Claimant's last job required sustained heavy labor, he retains the respiratory capacity to perform his last coal mining job or a job requiring similar effort. According to Dr. Fino, when the Claimant gives good effort, his maximal voluntary ventilation is normal, showing no ventilatory impairment (DX 64). Dr. Westerfield, a Board-certified Internist and Pulmonologist, opined that the Claimant does not have respiratory disability, and "certainly does not have respiratory disability due to pneumoconiosis," based on his review of the Claimant's medical records dated from 1994 through 1998, including medical reports, pulmonary function tests, and arterial blood gas studies (DX 63). Drs. Fino and Westerfield gave the reasoning for their opinions and cited the documents and tests upon which they relied. As such, I find their opinions are reasoned, documented, and entitled to substantial weight.

Dr. Dineen wrote in his June 30, 1994 examination report that the Claimant retains the pulmonary capacity to perform his former duties as a coal miner. Dr. Dineen diagnosed chronic bronchitis, secondary to the Claimant's habit of cigarette smoking. He opined that the Claimant's cigarette smoking habit is responsible for his minimal obstructive airway disease (DX 38). In his May 5, 1994 examination report, Dr. Jarboe opined that the Claimant retains the functional capacity to do his last coal mining job or to perform

similar work in a dust-free environment. According to Dr. Jarboe, the Claimant's mild restrictive defect and mild airway obstruction are not due to coal workers' pneumoconiosis. Dr. Jarboe opined that the Claimant's chronic bronchitis is related his history of very heavy smoking and artery bypass grafting and valve replacement (DX 38). In his April 1994 examination report, Dr. Broudy opined that the Claimant retains the respiratory capacity to do his previous work or work requiring similar effort. According to Dr. Broudy, there has not been any significant pulmonary disease or respiratory impairment that has arisen from the Claimant's occupation as a coal worker. He opined that the Claimant's chronic bronchitis is due to cigarette smoking (DX 38). Dr. Vuskovich examined the Claimant in March 1994, and opined that the Claimant is physically able, from a pulmonary standpoint, to perform his usual coal mine employment or comparable and gainful work in a dust-free environment. In his opinion, the Claimant's conditions are all conditions of the general population, and are in no way related to his occupation in the coal industry (DX 38).

Although the reports by Drs. Dineen, Jarboe, Broudy, and Vuskovich were written in 1994, these physicians conducted extensive examinations of the Claimant, including x-ray, pulmonary function tests, arterial blood gas studies, and histories. They stated the reasons for their conclusions, and identified the tests upon which they relied. As such, I find that their opinions are reasoned, documented, and entitled to substantial weight.

Drs. Baker, Watts, and Smiddy opined that the Claimant is totally disabled due to pneumoconiosis. In his January 16, 2001 answers to questions posed by the Claimant's attorney, Dr. Baker wrote that the Claimant "has advanced pneumoconiosis and should have no further exposure to coal dust, rock dust, or similar noxious agents" (DX 74). A physician's report advising the claimant to avoid coal dust, etc., is insufficient to support total disability, because it fails to evaluate the extent of the claimant's disability. See Wheatley v. Peabody Coal Co., 6 B.L.R. 1-1214 (1984). Dr. Baker diagnosed a "moderate restrictive defect" in his August 14, 2000 report (DX 73), and a "mild impairment" in his January 26, 1996 report (DX 10). A diagnosis of chronic respiratory or pulmonary disease resulting in a "moderate" impairment is insufficient to establish total disability. Lesser v. C.F. & I. Steel Corp., 3 B.L.R. 1-63 (1981). For the reasons stated, I find that Dr. Baker's opinion is not well reasoned and documented, and accord it less weight.

In response to a list of questions from the Claimant's attorney, dated December 15, 2000, Dr. Watts opined that the Claimant has a disabling chronic obstructive pulmonary disease, based on the pulmonary function test performed by Dr. Smiddy, and "pulmonary evaluation." According to Dr. Watts, the Claimant's chronic obstructive pulmonary disease prevents him from performing

the "normal manual labor of an underground coal miner." I accord Dr. Watts' opinion less weight, because Dr. Smiddy's pulmonary function test was found to be invalid, and because Dr. Watts is not clear as to which "pulmonary evaluation" he refers. Further, Dr. Watts does not make a finding as to the specific requirements of the Claimant's usual coal mine employment, and does not appear to be familiar with the duties of the Claimant's last coal mine employment.

Dr. Smiddy wrote that the Claimant's pulmonary function study "shows severe restrictive impairment" (DX 57). I accord his opinion less weight because his pulmonary function test was found to be invalid, and he does not give the reasoning for his opinion.

Under § 718.204(b)(2)(iv), all evidence that is relevant to the question of total disability is to be weighed, with the Claimant bearing the burden of establishing total disability by a preponderance of the evidence. See Mazgaj v. Valley Camp Coal Co., 9 B.L.R. 1-201, 1-204 (1986). For the reasons stated above, I find that the opinions of the highly qualified consultants, Drs. Fino and Westerfield, together with the opinions of Drs. Dineen, Jarboe, Broudy, and Vuskovich, are entitled to greater weight than the opinions of Drs. Baker, Watts, and Smiddy.

As the Claimant has not established total disability due to pneumoconiosis by a preponderance of the evidence, I find that the medical reports cannot support a finding of total disability due to pneumoconiosis pursuant to § 718.204.

VI. ENTITLEMENT

I find that the Claimant has failed to establish that he has pneumoconiosis and is totally disabled from a pulmonary or respiratory impairment arising out of coal mine employment. Therefore, he has not established entitlement to benefits under the Act.

VII. ATTORNEY'S FEE

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation and services rendered in pursuit of the claim.

VIII. ORDER

It is, therefore,

ORDERED that the claim of Eugene Johnson for benefits under the Act is hereby DENIED.

A

Robert L. Hillyard
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C., 20013-7601. A copy of a Notice of Appeal must also be served upon Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C., 20210.